IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 67631-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
OSCAR ARMANDO ESCOBAR,	)	
	)	
Appellant.	)	FILED: June 11, 2012
	)	

Leach, C.J. — Oscar Escobar appeals his judgment and sentence for first degree kidnapping, first degree burglary, first degree robbery, second degree assault, and felony harassment on multiple grounds. Specifically, he challenges (1) the adequacy of the information, (2) the trial court's failure to instruct the jury on a "true threat" and the need for unanimity on an alternative means charge, (3) the sufficiency of the evidence, and (4) the effectiveness of his trial counsel. He also contends that his conviction for second degree assault violates the prohibition against double jeopardy.

The State appropriately concedes that we should reverse the conviction for robbery because the court instructed the jury on an alternative means not alleged in the information. Because "true threat" is not an element of felony harassment, Escobar's other challenge to the information fails. The trial court's failure to instruct the jury that the crime of harassment requires a "true threat"

was harmless beyond a reasonable doubt. Because substantial evidence supported each alternative means of burglary alleged, a unanimity instruction was not required. The record contains insufficient evidence to support the kidnapping conviction because it does not show restraint and movement of the victim with a purpose independent of Escobar's intent to commit assault. Because Escobar fails to demonstrate deficient performance and prejudice from the challenged conduct of his trial counsel, his claim fails. Sufficient evidence supports his second degree assault conviction. Because we reverse the robbery conviction, Escobar's double jeopardy claim fails.

FACTS

Early in the evening on February 4, 2008, Escobar went to Rigoberto Hernandez's apartment looking for someone named "Justin." After Hernandez said he did not know "Justin," Escobar pulled a gun and entered the apartment. Escobar put the gun to Hernandez's head and threatened to kill him if he did not tell Escobar where Justin was. As they entered the kitchen, Escobar ordered Hernandez to give him a cordless phone from the counter. Escobar dialed a number and forced Hernandez to speak to the woman who answered the phone. Hernandez does not speak English fluently and did not understand everything Escobar instructed him to say; he also did not understand the woman's responses. After the woman (later identified as Escobar's wife) hung up,

Escobar continued to walk around the apartment looking for Justin, keeping Hernandez at gunpoint the entire time. When Escobar lowered the gun to open a closet door, Hernandez ran out of the apartment.

Hernandez ran down the stairs and into the parking lot, where he found his brother and a friend sitting in a parked car. Hernandez got into the car, and they drove away. As they left the parking lot, he saw Escobar standing next to a Mitsubishi Eclipse. That car followed them for a while before they lost sight of it. Then Hernandez called 911 and met with police. When police escorted Hernandez home, he found that his cordless phone was missing from his apartment. Later, a neighbor told police that he had seen a Hispanic male running down the stairs of the apartment complex, followed soon after by another Hispanic male carrying a cordless phone. The witness did not remember if the second man was carrying a gun, and he could not positively identify Escobar or Hernandez as the men he had seen.

Police arrested Escobar several hours later at the home of his mother-in-law, Rita McDonald. He smelled of alcohol and seemed intoxicated, but not enough to impair his speech. Officers read Miranda warnings to Escobar twice—first when putting him into the patrol car and again in an interrogation room at the police station. At the station, Escobar signed a written Miranda waiver and spoke with Officer Jeff Martin. Escobar stated, "I f——ed up, okay. I

went into the apartment looking for Justin. I'm a jealous man. I asked the guy where he was. He told me Justin didn't live here—he didn't live there and I didn't believe him." Escobar later stated, "I'm sorry for what I did. I made a mistake. Take me to jail," at which point Martin terminated the interview.

The State charged Escobar with kidnapping, robbery, burglary, assault, and harassment. The jury convicted him on all charges. Escobar appeals.

ANALYSIS

Escobar challenges the robbery and harassment convictions for alleged charging errors. First, he argues that the trial court improperly instructed the jury on an uncharged alternative means of committing robbery. The amended information charged only one means of committing first degree robbery—that "the defendant displayed what appeared to be a firearm or other deadly weapon." However, the "to convict" instruction included two alternative means: "the defendant was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon." The State concedes reversible error. Because a criminal defendant cannot be tried for an uncharged offense,[1] we accept the State's concession and reverse the robbery conviction.[2]

[1] State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988) (citing State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942)).

[2] Because we accept the State's concession and reverse the robbery conviction, Escobar's claim that the assault conviction violates double jeopardy becomes moot. Therefore, we do not consider it here. Our failure to consider this claim is without prejudice to Escobar's ability to assert it if he is again

Escobar also argues that "true threat" is an essential element of the crime of harassment,[3] which must be pleaded in the information. In State v. Tellez,[4] we held that the "constitutional concept of 'true threat' merely defines and limits the scope of the essential threat element in the felony . . . harassment statute and is not itself an essential element of the crime" and need not be included in the charging document. Thus, Escobar's challenge to the sufficiency of the information to charge harassment fails.

Escobar next asserts that the court erred by failing to instruct the jury that the crime of harassment requires a "true threat."[5] RCW 9A.46.020 provides in relevant part:

> (1) A person is guilty of harassment if:
> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; [and]
> . . . .
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.
> . . . .
> [(2)](b) A person who harasses another is guilty of a class C felony if . . . the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened.

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convicted of robbery on remand.

[3]RCW 9A.46.020(1)-(2).

[4]141 Wn. App. 479, 484, 170 P.3d 75 (2007).

[5] Escobar failed to raise this error below, but he may raise for the first time on appeal the absence of a jury instruction on the true threat requirement. State v. Schaler, 169 Wn.2d 274, 287-88, 236 P.3d 858 (2010).

To avoid an unconstitutional infringement of protected speech, this statute prohibits only true threats.[6] In State v. Schaler,[7] our Supreme Court held a jury must be instructed about the true threat requirement; the State "must establish that a reasonable person in the defendant's position would foresee that his statements or acts would be interpreted as a serious expression of intention to carry out the threat" to prove felony harassment. The challenged instruction in Schaler read, "'A person threatens "knowingly" when the person subjectively intends to communicate a threat.'"[8] Because this instruction required a knowing mens rea for the conduct (communicating) and the circumstances (communicating an intent to kill) but did not require any mens rea about the result (that the victim reasonably feared the threat would be carried out), the court determined that a jury could have convicted Schaler on something less than a true threat.[9]

Escobar contends that Schaler requires reversal of his felony harassment conviction. Because the challenged instructional error was harmless, we disagree. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error."[10] Here, despite the lack of a "true

[6] State v. Kilburn, 151 Wn.2d 36, 41, 84 P.3d 1215 (2004).
[7] 169 Wn.2d 274, 292, 236 P.3d 858 (2010).
[8] Schaler, 169 Wn.2d at 285.
[9] Schaler, 169 Wn.2d at 286-87.

threat" instruction, the jury could have found only that Escobar acted with the intent that Hernandez believe he meant to kill him. His threat to kill Hernandez and the actions that accompanied that threat—putting a gun to the victim's head and keeping the gun on him throughout the entire incident—establish that any reasonable jury would have found both that Escobar intended the threat to be taken seriously and that Hernandez would have indeed taken the threat seriously.

Escobar claims that the jury could have determined from his intoxication that his threats "were hyperbole or puffery rather than serious threats to kill." But the jury heard no evidence from which it could reasonably reach this conclusion. Escobar told Hernandez that he wanted to kill someone; if he did not find Justin, then he would kill Hernandez. Escobar pulled a bundle of cash out of his pocket and told Hernandez that he would take off with the money if he killed Hernandez. He pointed a gun at Hernandez's head and kept it pointed at him until he escaped. Afterward, Escobar told McDonald that he had gone to Justin's house with a gun. He intended to scare Justin away from his wife. He pointed his gun at Justin's brother (actually Hernandez).

On appeal, Escobar contends that he merely engaged in "drunk talk." But Escobar's threats included much more than talk. They included the display and

[10] State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

pointing of a gun that demonstrated to Hernandez the immediate ability to carry out the verbal threat. We are persuaded beyond a reasonable doubt that any reasonable jury given a "true threat" instruction and hearing the trial evidence would have convicted Escobar.

Contrary to Escobar's briefing, State v. Johnston[11] does not support his claim. In Johnston, a drunken airline passenger threatened to blow up the airport after a flight attendant confiscated his personal liquor and removed him from the plane.[12] Our Supreme Court held that a bomb threat statute would be overbroad unless limited to true threats. It reversed Johnston's conviction because the trial court failed to instruct the jury about this limitation.[13] The State conceded this error was not harmless. While the Johnston court described this concession as appropriate,[14] it did not address whether the defendant's intoxication made it so. Therefore, Escobar's analogy of his case to Johnston fails.

Next, Escobar challenges the sufficiency of the evidence to support the kidnapping and assault convictions. When reviewing a sufficiency challenge, we view the evidence in the light most favorable to the prosecution and ask whether any rational trier of fact could have found the essential elements of the crime

[11] 156 Wn.2d 355, 127 P.3d 707 (2006).
[12] Johnston, 156 Wn.2d at 357-58.
[13] Johnston, 156 Wn.2d at 366.
[14] Johnston, 156 Wn.2d at 364.

beyond a reasonable doubt.[15] We draw all reasonable inferences from the evidence in favor of the State.[16] A defendant challenging the sufficiency of evidence admits the truth of the State's evidence.[17]

To convict Escobar for first degree kidnapping, the State must prove he intentionally abducted Hernandez with the "intent to facilitate the commission of assault in the second degree or flight thereafter."[18] (Emphasis added.) "Abduct" means "to restrain a person by either (a) secreting or holding him or her in a place where he or she is not likely to be found, or (b) using or threatening to use deadly force."[19] "Restrain" means "to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty."[20] But our Supreme Court has held that "the mere incidental restraint and movement of [a] victim during the course of another crime" cannot support a separate kidnapping charge where the movement and

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[15] State v. Lord, 117 Wn.2d 829, 881, 822 P.2d 177 (1991).

[16] State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

[17] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[18] RCW 9A.40.020 states that kidnapping is an intentional abduction with the intent to facilitate the commission of a felony, but the State's amended information specified the crime of assault, and the jury instructions reflected the charging document. Because unobjected-to jury instructions become the law of the case, we do not address the possibility that Escobar may have intentionally abducted Hernandez with the intent to commit some other felony, i.e., burglary, robbery, or harassment. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995).

[19] RCW 9A.40.010(1).

[20] RCW 9A.40.010(6).

restraint had "no independent purpose or injury."[21] Whether a kidnapping is incidental to the commission of other crimes is a fact-specific determination.[22]

The State argues that Escobar's restraint of Hernandez had an independent purpose because the restraint continued even after Escobar had taken the cordless phone. However, our decision in State v. Manchester[23] directly conflicts with the State's position; we held that a robbery is not complete until the assailant has made his escape. Furthermore, in State v. Korum,[24] Division Two held that a defendant's kidnapping convictions were incidental to the robberies as a matter of law. Korum and several friends robbed the homes of several known drug dealers, binding the residents with duct tape and zip ties.[25] The State charged Korum with multiple counts of robbery, burglary, and kidnapping.[26] Reversing the kidnapping convictions, the court reasoned, "That all robberies necessarily involve some degree of forcible restraint, however, does not mean that the legislature intended prosecutors to charge every robber with kidnapping."[27] Based on Manchester and Korum, Escobar did not complete

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[21] State v. Brett, 126 Wn.2d 136, 166, 892 P.2d 29 (1995).

[22] State v. Elmore, 154 Wn. App. 885, 901, 228 P.3d 760, review denied, 169 Wn.2d 1018, 238 P.3d 502 (2010).

[23] 57 Wn. App. 765, 770, 790 P.2d 217 (1990).

[24] 120 Wn. App. 686, 689, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2006).

[25] Korum, 120 Wn. App. at 690-92.

[26] Korum, 120 Wn. App. at 692-93.

[27] Korum, 120 Wn. App. at 705.

the robbery until he actually left the apartment with the phone, and the restraint used to abduct Hernandez was incidental to the taking. We agree that the State lacked sufficient evidence to support Escobar's kidnapping conviction.

Escobar also challenges the sufficiency of the "deadly weapon" evidence supporting the second degree assault conviction. Count IV of the amended information charged Escobar with intentionally assaulting Hernandez with a deadly weapon—a handgun. Consistent with RCW 9A.36.021(1)(c), the "to convict" instruction for second degree assault required the State to prove beyond a reasonable doubt that "the defendant assaulted . . . Hernandez with a deadly weapon." Escobar argues that the court's instructions required the State to prove that the object Escobar used to threaten Hernandez was a deadly weapon under the circumstances in which it was used,[28] and the State failed to do so.

Sufficient evidence supports a deadly weapon finding if a witness to the crime has testified to the presence of a gun.[29] Hernandez testified that Escobar held a gun to his head, that it was small, and that it was a real gun, rather than someone's hand held up as if imitating a gun. Officer Martin testified that

[28] Jury instruction 19 defined a deadly weapon as "any firearm, whether loaded or unloaded, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury."

[29] State v. Faust, 93 Wn. App. 373, 381 n.6, 967 P.2d 1284 (1998).

Hernandez, communicating through a bilingual police officer, originally described the gun as a small, black, semiautomatic handgun. Although Hernandez could not remember what the gun looked like at trial, the jury could infer that this was due to a simple lack of memory, rather than the absence of a gun. Therefore, sufficient evidence supports the second degree assault conviction.

Escobar also challenges his burglary conviction, claiming insufficient evidence supports one of the means submitted to the jury without any way to determine that the jury unanimously relied upon a means for which there was sufficient evidence.[30] Criminal defendants have a right to a unanimous jury verdict[31] that may be raised for the first time on appeal.[32] In alternative means cases, where an offense may be committed in more than one way, the jury must unanimously agree as to guilt for the crime charged but need not expressly agree as to the means, so long as substantial evidence supports each alternative.[33] In this circumstance, we "infer that the jury rested its decision on a unanimous finding as to the means."[34]

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[30]Escobar makes the same argument for his robbery conviction, but we have reversed it on other grounds.

[31] State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

[32] State v. Furseth, 156 Wn. App. 516, 519 n.3, 233 P.3d 902, review denied, 170 Wn.2d 1007, 245 P.3d 227 (2010).

[33] State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) (citing State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987)).

[34] Ortega-Martinez, 124 Wn.2d at 707-08.

To convict Escobar of first degree burglary, the State had to prove that he entered or remained unlawfully in the apartment with the intent to commit a crime and that in so entering or while in the building, he was armed with a deadly weapon or assaulted a person. As discussed above, the State presented sufficient evidence to support each alternative means; therefore, a unanimity instruction was not required.

Escobar also maintains that he received ineffective assistance of counsel. Claims of ineffective assistance present mixed questions of law and fact that the courts review de novo.[35] To prove ineffective assistance, a defendant must show deficiency as well as prejudice.[36] Counsel's representation is deficient if it falls below an objective standard of reasonableness.[37] "The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case as of the time of counsel's conduct."[38] Prejudice occurs when it is reasonably probable that but for counsel's errors "'the result of the proceeding would have been different.'"[39] There is a strong presumption that counsel was effective, and the defendant bears the burden of demonstrating that there was no legitimate strategic or tactical reason for the

[35] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).
[36] State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986) .
[37] State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).
[38] Lord, 117 Wn.2d at 883 (citing Strickland v. Washington, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).
[39] Lord, 117 Wn.2d at 883-84 (quoting Strickland, 466 U.S. at 694).

challenged conduct.[40]

Escobar argues his counsel was ineffective when he elicited Officer Martin's testimony about Hernandez's original detailed description of the gun to impeach Hernandez's trial testimony, without requesting an instruction limiting the use of this evidence. But during the trial, the defense used this testimony for more than impeachment purposes. Further, Hernandez's description of the gun was only one of many pieces of evidence that Escobar was armed with a gun. Escobar fails to show deficient performance or prejudice on this allegation.

Next he claims counsel was deficient by failing to make a hearsay objection to Rita McDonald's statement that Escobar must have told her he had taken a gun to Justin's house. Because this testimony is admissible under ER 801(d)(2) as an admission by party-opponent, counsel did not err by failing to object to it.

CONCLUSION

We vacate the kidnapping and robbery convictions but otherwise affirm and remand for further proceedings consistent with this opinion.

Leach, C.J.

WE CONCUR:

[40] State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).